In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-840

TEXAS INDUSTRIAL ACCIDENT BOARD, ET AL.,
Petitioners

versus

INDUSTRIAL FOUNDATION OF THE SOUTH
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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QUESTIONS PRESENTED

1. Does the Texas Open Records Act authorize disclosure of publicly recorded information retained by a state agency?

2. Assuming that the Texas Open Records Act provides that the privacy doctrine constitutes a statutory exemption to disclosure, can the right to privacy be expanded to include the disclosure of public records as a "fundamental" right under the Fourteenth Amendment to the United States Constitution?

STATUTORY PROVISIONS INVOLVED

The Texas Open Records Act, Article 6252-17A, Vernon's Annotated Civil Statutes, provides that all publicly recorded data must be disclosed upon request, subject to enumerated exemptions. Petitioners maintain that the publicly recorded material is exempt as "confidential" under the privacy con-

cept emanating from the Fourteenth Amendment to the Constitution.

REASONS FOR DENIAL OF WRIT

There is no special or significant reason why certiorari should be granted in this case. The proceeding sub judice involves an interpretation of the Texas Open Records Act, Article 6252-17a, Vernon's Annotated Civil Statutes (Supp. 1975-1976). Specifically, the Texas state judiciary had to decide whether information retained by petitioner, the Texas Industrial Accident Board, should be made available upon request to the respondent, Industrial Foundation of the South. At each stage of the tripartite juridical system the state courts concluded that the information requested is public information and thus should be disclosed to the requesting party pursuant to the provisions of the Texas Open Records Act.

The Texas State Legislature, through the enactment of the Open Records Act, has expressed its formal view that the records of State agencies, save several well-defined exceptions, must be available to the public. The State redactors expressly provided that the provisions of the Open Records Act shall be liberally construed with the view of carrying out the statutory purpose of disclosure. A fortiorari, any statutory exceptions to disclosure must be strictly interpreted, and, the governmental agency seeking protection under an exemption of disclosure must sustain the burden of proving the applicability of an exception to disclosure. See, e.g., *Washington Research Project, Inc. v. Department of H.E.W.*, 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed. 2d 450 (1974).

Section 3 of the Open Records Act requires disclosure of all information collected or maintained by governmental bodies such as the petitioner, though the Act enumerates sixteen exceptions which may be applicable to a request for disclosure. These sixteen exemptions, as noted by the Legislature, are the "only" exceptions to disclosure and the withholding of information or the limitation on the availability of records to the public is proscribed, except as specifically stated in these sixteen exceptions.

Petitioners assert that the requested material is exempt from disclosure under Section 3a(1) of the Open Records Act. That section, which constitutes one of the sixteen exceptions, provides:

> All information collected, assembled or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public . . . with the following exceptions only:
>
> (1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

To qualify under the above-quoted exception, the materials must be deemed confidential. Yet the petitioners have been unable to establish any relation of confidentiality regarding the requested material that prevents disclosure. Petitioners suggest that a constitutional right of privacy exists, and that this constitutional protection encompasses the requested data, thereby rendering the information statutorily inaccess-

ible. The petitioners' argument is erroneous in several respects. The Texas Supreme Court and inferior courts recognized the apparent misconceptions inherent in the petitioners' contention; accordingly, this argument was juridically rejected. This thrice rejected argument is now presented to the Court as a basis for jurisdiction to review the judgment of the State Supreme Court. Due to the absence of any substantial federal questions or constitutional issues, the instant Petition for Certiorari should be denied.

Of initial import is the manner in which the petitioners have failed to acknowledge basic general concepts of statutory construction in their argument regarding interpretation of the Open Records Act. The asserted exemption, Section 3a(1) of the Open Records Act, singularly pertains to the information deemed confidential by law – there is no reference to privacy in this exception. Moreover, the Legislature plainly did not intend to use on an interchangeable basis the terms "confidential" and "personal privacy." Indeed, the distinction between confidential and privacy is clearly reflected in the provisions of the Open Record Act. For example, in Section 3a(2) the Texas Legislature excluded "information and personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ." Likewise, in the ninth exemption to the Open Records Act, the Legislature provided that "private correspondence of an elected official relating to matters which would constitute an invasion of privacy" need not be disclosed. Since both the terms confidential and privacy were incorporated in the Open Records Act and since these terms are not placed in the same exemptions and are not used in the same context, it is apparent that the Legislature deliberately omitted allusion to the privacy doctrine in Section 3a(1) of the Open Records Act. This exception justifies a denial of access to the requesting party only when the requested material can be categorized as confidential. Ignoring the plain language of the Open Records Act and attempting to circumvent fundamental tenets of statutory construction, petitioners presumably argue that the term confidential serves as a springboard to the privacy doctrine. Such a position, however, requires a rewriting of the Texas Open Records Act.

The Open Records Act creates a liberal disclosure requirement for the inspection of public records limited only by sixteen carefully defined exceptions. By specifically naming the sixteen exceptions from disclosure, the Legislature expressed its intention to make all other records discoverable and available for public inspection. In refusing to disclose the requested material, petitioners rely upon the exception of confidentiality contained in Section 3a(1) of the Open Records Act. The petitioners, however, have not offered any constitutional, statutory, or judicial authority which classifies the requested information as "intrinsically confidential." 540 S.W. 2d at 691, Petitioners' App. p. 42.

As this Court observed in *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 81 S.Ct. 1579 6 L.Ed. 2d 859 (1961), the maxim "noscitur a sociis", a word is known by the company it keeps, is often wisely applied where a word is capable of several meanings in order to avoid the giving of unintended breadth to a legislative act. The words "confidential" and "privileged" are associated in the Open Records Act;[1] these terms dually connote a special or extraordinary relation be-

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1. For example, Section 3a(10) of the Open Records Act states that "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision" are exempt from disclosure.

tween the parties exchanging information. In drafting the Act's exemptions, which must be strictly construed, the Legislature chose not to link the term "confidential" with the privacy doctrine. These two concepts are distinct and do not overlap. It is apparent from the statutory usage of other verbiage which relate to the term confidential that the confidentiality exemption, Section 3a(1), cannot be expanded to encompass the privacy doctrine.

The statutory exclusion of confidential materials applies only to relations of trust, where one expects non-disclosure; in the present case, however, no relationship of confidentiality exists between workmen's compensation claimants and the petitioning state agency which receives the claim. As the Texas Supreme Court observed, certain state statutes make various records kept by state agencies confidential. 540 S.W. 2d at 677, Petitioners' App. pp. 11-12. No such statute, however, appears in the Texas Workmen's Compensation Act which would lend support to the petitioners' assertion. Further, the application of this interpretative principle to avoid widening an exemption comports with the Act's general presumption of disclosure and the restrictive construction accorded exemptions to disclosure.

The principle "expressio unius est excluso alterius" similarly governs an understanding of the present statute. The Legislature precisely formulated sixteen exceptions to the Open Records Act which are the only instances when information can be withheld from inspection. Specific government documents, such as student records, state auditors' reports, birth and death records, among others, have been excluded from public access, and, as discussed above, it is therefore significant to note that these statutory exemptions do not mention the materials requested by respondent herein. The explicit listing of those documents to be excluded from public inspec-

tion perforce establishes the propriety of disclosing the information sought by respondent. See *National Railroad Passenger Corporation v. Passenger Association*, 414 U.S. 453, 94 S. Ct. 690, 38 L.Ed. 2d 646 (1974).

This Court repeatedly has opined that the objective of a court in a case calling for the construction of a statute is to ascertain the legislative intent and give effect to the legislative will. See, e.g., *Philbrook v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 44 L.Ed. 2d 525 (1975). It is evident that the legislative intent behind the Open Records Act is to permit a full and relatively unfettered disclosure of government records to the public. When the Texas state judiciary was required to interpret the Open Records Act, the courts recognized and adhered to the cardinal rule of statutory construction, namely, discernment of legislative purpose. Consequently, the Texas courts properly enforced the public's right of access to government records, authorized by the Act and evidenced by the legislative will, and thus ordered the petitioners to disclose the requested information.

Despite the express legislative intent and provisions to distinguish between materials protected by the privacy concept and materials protected within the pale of confidentiality, the petitioners nevertheless contend that materials may be deemed confidential under a constitutional right of privacy in order to invoke the statutory exemption of confidentiality. Although there is no general right to privacy contained in the United States Constitution, a narrow and well-defined area of privacy has been jurisprudentially developed. Underlying the case by case approach to the privacy doctrine is the obvious judicial desire to protect certain personal activities which emanate from familial and similarly intimate social relationships. See, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147, (1973); *cf. Paul v. Davis*, _U.S.__, 96 S.

Ct. 1155, 47 L.Ed. 2d 405, (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972).

Assuming arguendo that the privacy doctrine can be applied in tandem with the exemption of confidentiality, which assumption would be unmistakeably incongruous with the plain policy of the Act, the concept of the right of privacy is not as expansive as petitioners suggest. The right to privacy has been limited by this Court to those areas which are classified as "fundamental" or "implicit in the concept of ordered liberty"; illustrative of these fundamental protections are the right to marry, to bear children, to worship, and to think and read what one wishes. See, *Eisenstadt v. Baird, supra; Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L. Ed. 2d 542 (1969); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967). In contradistinction, protection from the disclosure of public records retained by a state administrative tribunal has never been deemed a "fundamental right" under the United States Constitution or any amendments thereto, and, concomitantly, the workings of government agencies are not included within the realm of protection afforded by the right to privacy. *Cf. Stanley v. Georgia, supra; Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965). Petitioners proffer an interpretation of the privacy doctrine that would stretch the judicial dimension of privacy beyond definable boundaries - the privacy doctrine would be open-ended and all-inclusive. Acceptance of this position would effectively abrogate the public's access to the review of government activities.

The petitioners' asserted right to non-disclosure of publicly recorded information undoubtedly cannot be grouped with the "fundamental" and "intimate" spheres that are unintended for the public view. None of this Court's substantive privacy decisions hold that public claims filed with a state agency are entitled to protection under the auspices of the right of privacy, and, enlargement of the privacy doctrine to include a guarantee against dissemination of public claims would represent a complete emasculation of the well-marked zones of privacy developed by this Court.

It is undisputed that the information sought by the respondent may be given and frequently is disseminated to third parties, such as the employer of a claimant. There are no restrictions on the communication of this information by these recipients. Hence, the relationship between a person claiming workmen's compensation benefits and the petitioning state agency is not a confidential or privileged relation. This conclusion is reinforced by the fact that there is no legitimate expectation of privacy when an individual lodges his claim with the state agency and by the fact that there is no statutory classification of this data as confidential. In addition to the consideration that the information requested by respondents is freely distributed to other interested parties, it should be correspondingly noted that Section 5(b) of the Open Records Act specifically states that the motives of the requestor are not relevant and should not be considered in determining whether the information must be disclosed, though, as petitioners acknowledge, the state legislature has enacted safeguards against possible misuse of public access to government records.[2]

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2. The State of Texas has prohibited blacklisting and discriminating against workmen who have filed workmen's compensation claims by enacting Articles 5196c and 5196d and Article 8307c, Vernon's Annotated Civil Statutes.

The Petition for Certiorari now before the Court should be denied. This Petition does not contain any constitutional issues or federal questions which justify review by this Court. Rather, the case at bar involves construction of a state statute governing disclosure of public records, and, under any of the permissible interpretative approaches to the Texas Open Records Act, disclosure of the requested materials is proper. Even if normal statutory interpretations are ignored under the guise of the privacy doctrine, the requested information cannot be classified within any of the constitutionally protected zones of privacy created by this Court, and, as a result, these public records are available to the respondent pursuant to the Open Records Act.

The legislative intent surrounding the Open Records Act is readily discernible, to-wit: to maximize access by the public to government records. This statutory right to disclosure, qualified by specific exceptions, mandates a liberal construction in favor of disclosure. Though petitioners asseverate sweeping, unprecedented constitutional contentions and analogies to the Freedom of Information Act, 5 U.S.C. § 552, the Texas Open Records Act must be considered as written and must be viewed within the existing framework of the privacy doctrine, which has been limited by this Court to fundamental rights stemming from the Fourteenth Amendment to the United States Constitution. The information requested by respondent is not covered by any statutory exception to the Act nor is there any nexus between the requested matter and those fundamental rights developed under the Constitution.

CONCLUSION

The decision of the Texas Supreme Court is in complete

accord with the applicable decisions of this Court regarding statutory construction and the privacy doctrine, and, accordingly, for the reasons stated above, the Petition for Certiorari should be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Harry A. Rosenberg, hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari To the Supreme Court of the State of Texas has been served upon counsel for all petitioners, by depositing same in the United States mail, properly addressed and postage prepaid, this 24th day of February, 1977.

_____

HARRY A. ROSENBERG